Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
ASAP Paging, Inc.	)	WC Docket No. 04-6
	)	
Petition for Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers	)	

SPRINT REPLY COMMENTS

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Summary

Sprint makes the following points in these reply comments:

1. The PUCT's dialing parity argument is based on assumptions that are inconsistent with the record evidence. Contrary to the PUCT's belief, ASAP has customers who reside in, and receive calls in, the San Marcos local calling area. Moreover, LECs bill their customers based on the telephone number of the called party, and not the called party's physical location. Thus, the PUCT's assertions – that its decision "merely places ASAP on the same footing as any other provider in a similar situation," and that ASAP is "not treated differently" than other carriers – are factually incorrect.

2. The PUCT order conflicts with federal numbering rules. The FCC possesses exclusive jurisdiction over the rules governing number assignments, and it has not delegated this authority to the states. Accordingly, the PUCT was without legal authority to adopt additional eligibility requirements – namely, a wireless carrier must install a switch in every LEC local calling area as a condition to obtaining an NXX code associated with that rate center.

3. The PUCT order creates an impermissible entry barrier in contravention of Section 253(a). An order requiring a wireless carrier to acquire switching capacity it does not need as a condition to offering the same inbound calling area that an incumbent offers to its own customers has the "effect of prohibiting" entry, which is unlawful under Section 253(a).

4. The PUCT order constitutes impermissible entry regulation in contravention of Section 332(c). The PUCT order, which requires wireless carriers to install specific network elements as a condition to providing a service comparable to what the incumbent offers its own customers, constitutes entry regulation prohibited by Section 332(c).

5. CenturyTel's additional defenses lack merit. The FCC has ample authority to act on the ASAP petition even though the calls at issue involve intrastate traffic. ASAP's telephone numbers are not "virtual" numbers. Moreover, the FCC has ruled repeatedly that "virtual" numbers are lawful under its existing rules. Finally, CenturyTel's "ASAP has alternatives" argument is legally irrelevant and factually erroneous.

6. The rural LEC view of interconnection law lacks all merit. The rural LEC argument that they can charge wireless carriers for delivering rural LEC traffic if the wireless interconnection point is outside of the LEC's local calling carrier (but within the originating LATA) is incompatible with FCC rules affirmed on appeal, incompatible with FCC decisions on point (and also affirmed on appeal), and incompatible with federal appellate court arbitration review decisions.

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SPRINT REPLY COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions ("Sprint"), submits this reply to the comments filed in support of the decision by Public Utility Commission of Texas ("PUCT") that is the subject of the ASAP Paging preemption petition.

I. THE PUCT'S DIALING PARITY ARGUMENT IS BASED ON ASSUMPTIONS THAT ARE INCONSISTENT WITH THE RECORD EVIDENCE

CenturyTel customers in San Marcos can reach other LEC customers with local numbers (whether served by CenturyTel, SBC or Verizon) by dialing only seven digits. In contrast, these customers must dial eight digits ("1" plus the seven digit number), and incur toll charges, when they call an ASAP customer with a local number in the same rate center. This disparate dialing arrangement contravenes the Section 253(b)(3) dialing parity requirement and the Commission's implementing rules.[1]

The PUCT argues that "no local parity issue" arises from the discriminatory dialing arrangement that it has endorsed.[2] The PUCT asserts that "the [CenturyTel] calling and [ASAP]

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[1] *See* Sprint Comments at 20-24; Verizon Wireless Comments at 3-5.

[2] *See* PUCT Comments at 16.

called parties were not both within the San Marcos [local calling] area."[3] This PUCT conclusion is factually incorrect and rests on to incorrect assumptions:

1. In Texas, "[t]he location of the calling customer and the called customer should be used for purposes of retail rating ELCS calls" – that is, whether calls should be rated as local or toll;[4] and
2. "[N]one of the calls from CenturyTel San Marcos customers to the ASAP numbers actually went to the Kyle, Fentress or Lockhart exchanges."[5]

Neither of these statements is factually correct, much less supported by record evidence.

First, for purposes of retail rating, local exchange carriers ("LECs") in Texas do not rate calls as local or toll based on the physical location of the calling and called parties – but rather by comparing the NPA-NXXs assigned to these parties. This is evident from LEC foreign exchange ("FX") services, where calls are rated as local even though the FX customer is physically located outside the originating local calling area. A PUCT arbitrator recently described FX service in Texas as follows:

> FX service . . . is a retail service offering purchased by customers which allows such customers to obtain exchange service . . . other than the mandatory local calling area where the customer is physically located. * * * From the perspective of the end user located in the foreign exchange, the FX customer appears to be "local" and calls made to that customer are treated as local.[6]

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[3] *Id.* at 6.

[4] *See Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.* PUC Docket No. 25673, *Order,* at 17 ¶ 19 (Oct. 9, 2003)("PUCT Order").

[5] PUCT Comments at 4.

[6] *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic*, PUC Docket No. 24015, *Revised Arbitration Award*, at 31-32 and 49 (Aug. 27, 2002). *See also id.* at 30-31 ("The end user in the foreign exchange is able to avoid toll calls to the FX customer and instead to place local calls to the FX customer physically located in a different exchange. . . . To be sure, these FX arrangements provide FX customers with exchange service within a Commission-prescribed mandatory local calling area even though the FX customer physically resides outside of said mandatory local calling area.").

FX service works because LECs rate their calls based on the telephone number of the called party – and not the called party's physical location.[7]

Similarly, the Texas Number Conservation Task Force has defined a "local calling scope" as a "set of Telephone Numbers (TN) that any Local Service Customer (LSC) may call without incurring Toll charges. This set of TNs is usually defined by the NPA-NXX (e.g., 512-936) of the called party."[8] The Task Force has further defined "call rating" for retail purposes as the "establishing of a pricing basis for calls between two Telephone Numbers (TNs)," and that "NPA-NXXs . . . have been used for Call Rating."[9]

In this regard, Sprint's LEC division (including Sprint's Texas operations) bases its retail end user rates on the NPA-NXX of the calling and called party. Other incumbent LECs in the San Marcos local calling area also base their retail rates for calls to ASAP based on the numbers assigned to ASAP customers – and not based on the ASAP customer's physical location at the time (and certainly not based on the location of ASAP's switch).[10] Indeed, it is impossible for LECs to rate their customers' calls based on the physical location of called wireless customers, which is why, since the inception of the wireless industry, LECs' retail rates have been based

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[7] The PUCT's only response to the inconsistency between FX services and its challenged order is that FX service is "irrelevant" because it involves a "special arrangement." *See* PUCT Comments at 15. FX service is not irrelevant because the service demonstrates that LECs rate FX calls as local even though the FX customer may not be physically located within the originating exchange.

[8] ASAP FCC Exhibit No. 8 at 84.

[9] *Id.* at 84 and 95. *See also id.* at 6 ("The requirement for the CLEC to have one NXX per rate center is necessary if the CLEC is to perform call rating/billing consistent with the ILEC."); *id.* at 7 ("The practice of assigning an NXX code per provider, per ILEC rate center, per CO, is allowable under the *CO Code (NXX) Assignment Guidelines* (Attachment 1) and consistent with the regulatory requirements of Texas.").

[10] *See* ASAP Petition at 40 n.80. The PUCT now suggests that SBC and Verizon are not billing their own customers' calls correctly. *See* PUCT Comments at 15 (ASAP's "observation that a call from a Southwestern Bell Lockhart customer to an ASAP Lockhart NPA-NXX would be toll under the PUCT's order is correct – and completely appropriate, given that all Lockhart-to-Austin calls are intraLATA toll.").

upon the NPA-NXX assigned to the wireless customer. Thus, the PUCT's assertion that LECs use the location of the calling and called parties in retail rating is not accurate.

Second, even assuming that the PUCT was correct that LECs did rate calls based on the physical location of parties, its additional assertion – that "none of the calls from CenturyTel San Marcos customers to the ASAP numbers actually went to the Kyle, Fentress or Lockhart exchanges"[11] – is incompatible with the record evidence. CenturyTel below did not dispute ASAP's evidence that ASAP's customers with local telephone numbers receive their telecommunications within the Century exchange.[12] Indeed, the PUCT's Administrative Law Judge specifically found that some of CenturyTel's customers' calls to ASAP customers "actually reach a paging customer located in the ELCS territory."[13]

The PUCT cites the Commission's *Mountain* decision for the proposition that "federal law does not prohibit a LEC from assessing toll charges to its customers for calls that terminate to a paging customer at a geographic location outside the LEC's local calling area."[14] But at issue in the *Mountain* case was intercarrier compensation obligations, specifically the lawfulness of LEC trunk charges assessed on the terminating carrier, *not* the LEC's retail rating practices (*e.g.*, what it bills its own customers). The PUCT also neglects to mention that the D.C. Circuit Court of Appeals has vacated the FCC's *Mountain* order for being arbitrary and capricious.[15]

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[11] PUCT Comments at 4.

[12] *See* ASAP PUCT Exhibit No. 43, Pre-Filed Testimony of Ted Gaetjen at 3; ASAP Petition at 12 n.13; PUCT Hearing Transcript at 582-83 (Nov. 2002)(cross-examination of CenturyTel witness Wesley Robsinson); PUCT Hearing Transcript at 534-35 (Oct. 11, 2002)(cross-examination of CenturyTel witness John Navarrette).

[13] ASAP FCC Exhibit No. 5, ALJ Proposal for Decision at 5.

[14] PUCT Comments at 12.

[15] *See Mountain Communications* v. *FCC,* 355 F.3d 644 (D.C. Cir. 2004), *vacating Mountain Communications* v. *Qwest,* 17 FCC Rcd 15135 (2002).

The PUCT also argues in passing (a single sentence) that this Commission has actually "endorsed" the approach that the PUCT utilized in the challenged order.[16] According to the PUCT, the FCC has recognized that "retail rating" of land-to-mobile calls can be based on "the point of interconnection between LEC and CMRS carriers as the termination point of the call."[17] There are numerous flaws with this new PUCT argument:

- The FCC discussion of the "point of interconnection" ("POI") was in the context of intercarrier compensation between LECs and CMRS carriers – and NOT in the context of how LECs rate their "retail" calls to their own customers;
- The FCC contemplated that the two affected parties would mutually agree to use of this "alternative" – not that the incumbent LEC would change unilaterally (without prior notice in the case with CenturyTel) the long-standing industry convention;[18]
- In its challenged order, the PUCT did not hold that LECs should rate calls as local or toll based on the physical location of the POI; rather, it held that incumbent LECs should rate calls based on the physical location of a wireless carrier's switch;[19]
- Even if a state commission required an incumbent LEC to offer a POI alternative to competitive carriers, to the extent an incumbent LEC offers a conventional (NPA-NXX) approach to any one carrier, it must offer the same approach to another other carrier upon request;[20] and
- Finally, the POI alternative the FCC mentioned in 1996 is no longer feasible with the introduction of wireless number portability; the FCC has ruled that

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[16] *See* PUCT Comments at 13. CenturyTel makes this same argument. *See* CenturyTel Comments at 21.

[17] *See* PUCT Comments at 13, citing *Local Competition Order,* 11 FCC Rcd 15499, 16017-18 ¶ 1044 (1996)("As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.").

[18] *See Starpower,* 18 FCC Rcd 23625 at ¶ 17 (2003)("Verizon South presents no evidence in this regard that the parties proposed or discussed alternatives to the industry-wide system of rating calls by NPA-NXX.").

[19] PUCT Order at 7 ("[F]or purposes of determining whether a paging call is an ELCS [*i.e.,* local] or toll call under the specific facts of this case, CenturyTel's customers are calling ASAP's paging service at ASAP's mobile telephone switching office located in Austin. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS.").

[20] *Compare* 47 U.S.C. § 252(i).

> call rating does not change when a number is ported, and a POI alternative may very well result in the call rating of ported numbers changing.[21]

In summary, as Sprint can attest from its LEC operations in Texas, LECs do not rate calls based on the physical location of the calling and called parties (or on their point of interconnection with other carriers), but rather based on the NPA-NXX codes assigned to the parties. In any event, undisputed evidence in the record below is that the land-to-mobile calls at issue often originated and terminated in the same local calling area.[22]

It is clear from the foregoing that the PUCT's assertion that its decision "merely places ASAP on the same footing as any other provider in a similar situation" and that ASAP is "not treated differently"[23] are factually incorrect. CenturyTel customers dial seven digits to some persons with local telephone numbers (customers of incumbent LECs) and eight digits to other persons with local numbers (ASAP). This disparate dialing arrangement contravenes CenturyTel's dialing parity requirements under federal law.

II. THE PUCT ORDER CONFLICTS WITH FEDERAL NUMBERING RULES

The FCC has imposed only one requirement for a carrier like ASAP to obtain locally-rated telephone numbers: it provide service in the exchange.[24] It is undisputed that ASAP provides FCC-authorized services within the San Marcos local calling area.[25] Thus, ASAP had the

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[21] *See Intermodal Porting Order,* 18 FCC Rcd 23697 (2003).

[22] Of course, as the FCC has noted, "because wireless service is mobile and not fixed to a specific location, . . . the wireless service is not limited to use within that rate center." *Intermodal Porting Order,* 18 FCC Rcd 23697 at ¶ 11 (2003).

[23] PUCT Comments at 8. *See also id.* at I ("That order raised no real competitive concerns.").

[24] *See* Sprint Comments at 24-25, *citing* 47 C.F.R. § 52.15(g).

[25] *See* PUCT Order at 11 ¶ 17 ("ASAP owns paging terminals in the following locations: . . . San Marcos . . . ."); *id.* at ¶ 18 ("ASAP has a paging transmitter in Lockhart."). The Lockhart exchange is within the San Marcos local calling area. *See id.* at 14 ¶ 43. *But see* PUCT Comments at 4 ("ASAP did not have a switch or paging terminal in any of these exchanges.").

right under FCC rules to obtain local telephone numbers rated to the San Marcos local calling area.

The FCC has exclusive jurisdiction over telephone numbers.[26] Thus, the PUCT was without legal authority to adopt an additional eligibility requirement – namely, ASAP must also install a switch within the San Marcos local calling area in order to have the benefit of locally rated telephone numbers.

The PUCT's response to this numbering issue is limited to the following sentence:

> ASAP claims a sweeping "federal" right – here, to freely assign the NPA-NXXs it obtains to any geographic area it wishes and obtain local calling to those numbers strictly on the basis of this designation – but provides no authority to support its claim.[27]

In fact, ASAP did provide authority in support of its argument.[28] Among other things, ASAP cited a North American Numbering Council ("NANC") report to the Commission, which provided:

> NXX codes that are assigned to wireless carriers are associated to a specific wireline rate center and are communicated via the LERG. These are assigned to wireline rate centers in order to accomplish land to mobile rating. . . . *There is no state or federal requirements to associate an NPA-NXX for a new subscriber based on their residence, billing or other location.*[29]

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[26] *See* 47 U.S.C. § 251(e)(1)("The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."). While this statute permits the FCC to delegate some or all of this authority to states, the FCC has not delegated the issues involved in this proceeding. In fact, the FCC has specifically held that PUCs should not be involved in the number assignment process. *See Second Local Competition Order,* 11 FCC Rcd 19392, 19531-32 ¶¶ 315-22 (1996)("[W]e decline to authorize states to handle CO code assignment functions.").

[27] PUCT Comments at 16. *But see* Texas Number Conservation Task Force Report, at 7 ("The practice of assigning an NXX code per provider, per ILEC rate center, per CO, is allowable under the *CO Code (NXX) Assignment Guidelines*) and is consistent with regulatory requirements in Texas.")(Underscoring added), ASAP FCC Exhibit No. 8.

[28] *See* ASAP Petition at 34-40.

[29] ASAP Petition at 36-37, *quoting* NANC, *LNPA Working Group Report on Wireless Wireline Integration,* at 3 (May 8, 1998)(emphasis added).

Moreover, as Verizon Wireless has pointed out, the Commission recently affirmed that telephone numbers assigned to wireless carriers may have different rating and routing points.[30]

But the PUCT's position suffers from a more basic flaw. Because the FCC has exclusive jurisdiction over telephone numbers and because it has not delegated to the PUCT the authority to determine the conditions by which carriers can obtain locally-rated telephone numbers, the PUCT was without legal authority to adopt additional eligibility requirements – namely, wireless carriers must install a switch in every LEC local calling area as a condition to obtaining locally rated telephone numbers and offering an inbound local calling area comparable to what incumbent carriers offer their own customers.[31]

III. THE PUCT ORDER CREATES AN IMPERMISSIBLE ENTRY BARRIER IN CONTRAVENTION OF SECTION 253(A)

Section 253(a) of the Communications Act makes unlawful any state requirement that has "the effect of prohibiting" any firm from providing "any" telecommunications service, including intrastate services.[32] The PUCT order, however, has the effect of prohibiting ASAP from providing its desired services. As Sprint noted in its opening comments, the Texas Commission's order requiring wireless carriers to install a switch in each LEC local calling area as a condition

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[30] *See* Verizon Wireless Comments at 7-8, *citing Intermodal Porting Order,* 18 FCC Rcd 23697 (2003).

[31] The PUCT advances a new argument in its comments: ASAP's number assignments for ISP service, but not its paging services, "violate" industry standards. *See* PUCT Comments at 3 n.10. It bears noting that the PUCT does not quote fully from these standards. *See* Industry Numbering Committee, *Central Office Code (NXX) Assignment Guidelines,* INC 95-0407-008, at § 2.14 (March 23, 2004)("It is assumed from a wireline perspective that CO codes/blocks allocated to a *wireline service provider* are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. *Exceptions exist*, for example tariffed services such as foreign exchange service.")(emphasis added).

[32] 47 U.S.C. § 253(a). The Supreme Court has held that in using the phrase, "effect of prohibiting," Congress "signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces." *Nixon* v. *Missouri Municipal League,* No. 02-1238, Slip Op. at 13 (March 24, 2004).

to the provision of local service "frustrates the 1996 Act's explicit goal of opening local markets to competition."[33] A state order requiring a wireless carrier to acquire switching capacity it does not need as a condition to offering the same inbound calling area that an incumbent offers to its own customers unquestionably has the "effect of prohibiting" entry.

The PUCT responds by stating that "ASAP has not been prevented from providing telecommunications service."[34] But, in fact, the PUCT order does effectively prevent ASAP from providing the particular service it desires. Specifically, according to the PUCT, if ASAP (or any other wireless carrier for that matter) wants to offer an inbound local calling area comparable to what the incumbent offers its own customers, the wireless carrier must install switching capacity that it may not need. The Hobson's choice that CenturyTel and the PUCT have imposed on wireless carriers is this:

(a) Wireless carriers must increase their service prices to recover the costs of unneeded switching capacity; *or*

(b) Wireless carriers must offer a less attractive service to customers because calls from neighbors will be converted to toll calls.

Notably, the incumbent LEC benefits regardless of the "choice" a wireless carrier makes.

The PUCT additionally contends (in a single sentence) that its decision "fall[s] within the Section 253(b) exclusion."[35] The PUCT has the burden of demonstrating that the challenged activity comes within the exemptions contained in Section 253(b),[36] and merely quoting from the statute, as the PUCT has done, is not sufficient to satisfy that burden of proof. In addition, as

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[33] Sprint Comments at 19, *quoting Texas Preemption Order,* 13 FCC Rcd 3460, 3480 ¶ 41 (1997).

[34] PUCT Comments at 7.

[35] *See* PUCT Comments at 8.

noted above, the PUCT order cannot be deemed "competitively neutral" when wireless carriers are treated differently than incumbent LECs.[37] Finally, requiring a carrier to install a switch it does not need (much less in a particular location when switch locations are irrelevant to the quality of services provided) can hardly be deemed "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[38]

IV. THE PUCT ORDER CONSTITUTES IMPERMISSIBLE ENTRY REGULATION IN CONTRAVENTION OF SECTION 332(C)

Section 332(c)(3) of the Communications Act provides unequivocally that "no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service."[39] Sprint demonstrated in its comments that the PUCT's order – which requires ASAP to install an unnecessary switch in a local calling area as a condition to enjoying an inbound local calling area comparable to what the incumbent offers its own customers – constitutes the very kind of "entry regulation" that this statute explicitly prohibits.[40]

The only argument that the PUCT makes in response is that its order "falls far short of a clear restriction on entry or rate regulation."[41] However, the scope of preemption under Section 332(c) is not limited to state actions that impose "a clear restriction on entry." Rather, as federal

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[36] *See, e.g., Minnesota Preemption Order,* 14 FCC Rcd 21697, 21704 n.26 (1999); *Texas Preemption Order,* 13 FCC Rcd at 3501 ¶ 83; *Silver Star Preemption Order,* 12 FCC Rcd 15639, 15657 ¶ 41 (1997).

[37] The Supreme Court has stated that the "FCC has understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion." *Nixon* v. *Missouri Municipal League,* No. 02-1238, Slip Op. at 11 (March 24, 2004).

[38] 47 U.S.C. § 253(b).

[39] 47 U.S.C. § 332(c)(3)(A).

[40] *See* Sprint Comments at 19-20.

courts have held, this statute prohibits *any* state regulation involving wireless carrier entry in any way:

> There can be no doubt that Congress intended complete preemption when it said "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." This clause completely preempted the regulation of rates and market entry. * * * The statute makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure.[42]

The Commission has similarly held that "Section 332 of the Communications Act clearly preempts state regulation of CMRS entry":[43]

> The statue preempts state and local rate and entry regulation of all commercial mobile services. . . . Section 332(c)(3)(A) is clear as to the congressional intent to preempt State and local rate and entry regulation of commercial mobile radio services.[44]

A state commission order specifying the type of network equipment a wireless carrier must utilize in order to offer a particular service clearly would constitute entry regulation. Accordingly, the PUCT order under challenge is thus void *ab initio* because the PUCT lacked the authority to adopt any entry regulations applicable to wireless carriers.

V. RESPONSE TO MISCELLANEOUS CENTURYTEL ARGUMENTS

Sprint below responds below to several miscellaneous arguments CenturyTel advances in its comments.

A. CENTURYTEL'S VIEWS OF FEDERAL PREEMPTION IS FUNDAMENTALLY WRONG

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[41] PUCT Comment at 9. Curiously, the PUCT devotes most of its 2.5-page section addressing Section 332(c) preemption to the point that its decision did "not directly affect ASAP's CMRS rates or costs" (*id.*) – arguments that have no relevance to the entry regulation prohibition.

[42] *Bastien* v. *AT&T Wireless,* 205 F.3d 983, 986-87, 989 (7th Cir. 2000)(internal citations omitted).

[43] *Arizona Entry Petition Denial Order,* 10 FCC Rcd 7824, 7839 ¶ 71 (1995).

[44] *Second CMRS Order,* 9 FCC Rcd 1411, 1502-03 ¶¶ 240 and 242 (1994).

CenturyTel appears to suggest that the Commission cannot preempt the PUCT order because the order involves matters that are "solely intrastate," which CenturyTel claims is beyond the Commission's authority under Section 2(b) of the Communications Act under the Supreme Court's decision in *Louisiana PSC*.[45] This assertion is frivolous.

Even if Section 2(b) of the Act did impose some limitation on the Commission's authority as CenturyTel claims, Congress explicitly empowered the Commission to preempt under Sections 253 and 332(c) of the Act. As the Commission has already held in the context of Section 332(c), the preemption standards established in *Louisiana PSC* do "not apply" when Congress has enacted preemption statutes:

> In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services." Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).[46]

The Commission has further held that "section 253 expressly empowers the Commission to preempt enforcement of state or local legal requirements that prohibit or effectively prohibit the provision of any 'interstate or *intrastate* telecommunications service":

> Consequently, section 2(b)'s limitation on the Commission's authority over intrastate matters does not apply to the Commission's preemption authority under section 253.[47]

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[45] *See* CenturyTel Comments at 16-19. *See also* NECA/OPASTCO Comments at 2 ('[T]here is no basis for federal preemption of such inherently local rate regulation questions."); NTCA Comments at 2 ("The FCC lacks authority to preempt the Texas PUC").

[46] *Second CMRS Order,* 9 FCC Rcd at 1506 ¶ 256. *See also Arizona Entry Petition Denial Order,* 10 FCC Rcd at 7825 ¶ 5.

[47] *Arkansas Preemption Order,* 14 FCC Rcd 21579, 21587 ¶ 15 (1999)(emphasis in original). *See also Classic Telephone,* 11 FCC Rcd 13082, 13094 ¶ 24 (1996).

In fact, Section 2(b) of the Communications Act has no relevance to this preemption proceeding. Congress amended Section 2(b) in the Omnibus Budget Reconciliation Act of 1993 to exempt wireless services from the statute's restrictions, including LEC-wireless interconnection.[48] In this regard, the Commission has repeatedly recognized that "section 332(c), read in combination with section 2(b), [gives] the Commission independent authority to promulgate rules governing LEC-CMRS interconnection."[49] Indeed, Section 332(c)(1)(B) not only gives the Commission plenary authority over all traffic that LECs and wireless carriers exchange, but it also directs the Commission to order LECs to provide interconnection on terms that are just and reasonable.[50] Sprint submits that the preemption petition ASAP has filed constitutes a request for reasonable interconnection under Section 332 of the Act.

In the end, this proceeding does not involve an issue of "state's rights." As the Supreme Court has held, "the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has":

> This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even

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[48] *See* Sprint Comments at 26.

[49] *Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9636 ¶ 82 (2001). *See also Metrocall* v. *Concord Telephone,* 17 FCC Rcd 2252, 2256 n.28 (2002); *TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11168 ¶ 3 (2000), *aff'd, Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

[50] *See, e.g., Use of Radio Dispatch Communications,* 10 FCC Rcd 6280, 6293 n.71 (1995)("The Commission must respond to all complaints filed by a CMRS provider that its reasonable request for interconnection was refused."); *CMRS Interconnection,* 10 FCC Rcd 10666, 10685 ¶ 39 (1995); *Bowles* v. *United Telephone,* 12 FCC Rcd 9840, 9846-47 ¶ 11 (1997)(Section 332(c)(1)(B) "explicitly grant this Commission jurisdiction over the disputed matter. . . . [U]nder sections 201(a) and 332(c)(1)(B), the Commission has preempted any state regulation governing the kind of interconnection to which a CMRS provider is entitled."); *Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9640 ¶ 84 (2001)(Section 332(c)(1)(B) "expressly grants the Commission the authority to order carriers to interconnect with CMRS providers.").

> more restrictive than those drawn by the courts – but it is hard to spark a passionate "States' rights" debate over that detail.[51]

With regard to traffic that LECs and wireless carriers exchange, there is no "states' rights" issue at all, given the plenary authority the Commission possesses over land-mobile traffic as a result of the abrogation of the Section 2(b) restriction as applied to this traffic.

B. CENTURYTEL'S VIEWS OF "VIRTUAL" NUMBERS IS FUNDAMENTALLY WRONG

CenturyTel characterizes the telephone numbers ASAP has obtained as "Austin Virtual NXX Codes." CenturyTel must think this point is important, because it repeats this phrase 14 times in its comments.[52] But CenturyTel nowhere explains why this characterization is material to the issues in this case. Moreover, it is simply inaccurate as a factual matter.

ASAP's numbers are not "virtual" as that term has been defined. Virtual NXX codes, or numbers, generally refer to numbers a carrier obtains that are rated in a particular geographic area that are assigned to a customer located in a different geographic area. As noted above, ASAP provides its services in the San Marcos local calling area to customers using the service in the San Marcos local calling area. If ASAP did not obtain locally-rated telephone numbers, friends and neighbors of ASAP customers who live or work in San Marcos would incur toll charges in calling them – even if they happened to be located across the street at the time.

But CenturyTel's case is not enhanced even if the Commission was to accept the accuracy of CenturyTel's characterization. The Commission has recognized repeatedly that virtual NXX codes are lawful under existing rules.[53] Virtual numbers used by CLECs are no different

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[51] *AT&T* v. *Iowa Utilities Board,* 525 U.S. 366, 378 n.6 (1999).

[52] *See* CenturyTel Comments at ii (twice), iii, 3, 4 (twice), 5 (twice), 6 (three times), 7, 11 and 16.

[53] *See, e.g., Starpower* v. *Verizon South,* 18 FCC Rcd 5212 (2003); *Virginia Arbitration,* 17 FCC Rcd 27039 (2002). The FCC is admittedly reexamining this matter, but even if the FCC changes its rules, the change would take effect prospectively only. *See Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9610, 9652 ¶ 115 (2001).

than the virtual numbers ILECs assign to their FX customers, because in both instances the customer resides in an exchange other than the one where the number is rated. CenturyTel rates calls to incumbent LEC FX customers as local, yet it rates calls to ASAP customers with local numbers as toll. This is simply discriminatory.

C. CENTURYTEL'S "ASAP HAS ALTERNATIVES" ARGUMENT IS LEGALLY IRRELEVANT AND FACTUALLY ERRONEOUS

CenturyTel attempts to justify the PUCT order on the ground that ASAP supposedly has a "multiplicity of other options available to it if its paging and ISP customers truly need toll-free access from the San Marcos area."[54] All three of the "options" CenturyTel identifies have penalties associated with them (*e.g.*, they are more costly, they require number changes or the dialing of extra digits). But CenturyTel's "options" argument suffers from a more fatal flaw: an incumbent LEC is not permitted to determine what services a wireless carrier can, or cannot, provide.

Section 253(a) of the Act prohibits any state requirement having the effect of prohibiting a carrier from providing "any interstate or intrastate telecommunications service."[55] Congress was thus clear that it is carriers – not state regulators – that get to determine the type of telecommunications service they want to provide. There certainly is no basis in law, equity or policy to empower the incumbent monopolist to determine the types of services that a competitive carrier may provide – the very right that CenturyTel claims it possesses.

In any event, the three "options" CenturyTel identifies each have penalties associated with them:

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[54] CenturyTel Comments at 23.

[55] 47 U.S.C. § 253(a).

1. Direct Interconnection. CenturyTel asserts that one "option" would be for ASAP to "establish a physical point of interconnection and direct local trunks with CenturyTel."[56] This "option" would not help ASAP in any way. This is because the PUCT ruled that what is relevant for local call rating is the physical location of ASAP's switch, not the location of the point of interconnection ("POI") between ASAP and CenturyTel.[57]

Moreover, a local POI would disadvantage CenturyTel, even if the FCC assumes that the PUCT really meant POI when it said switch. Assume ASAP leased a facility from its switch in Austin to some location in the San Marcos local calling area in order to establish a direct interconnection with CenturyTel. Under current FCC rules affirmed on appeal, the originating carrier is responsible for the costs of delivering its traffic to "to the terminating carrier's end office switch that directly serves the called party, or equivalent facility" – that is, to ASAP's Austin switch.[58] All the traffic between ASAP and CenturyTel is in the land-to-mobile direction.[59] Thus, if ASAP leased a trunk between Austin and San Marcos, as CenturyTel is suggesting, CenturyTel would be required to reimburse ASAP for 100 percent of the cost of this trunk, plus ASAP's handling charges.[60] Given that CenturyTel currently does not incur any out-of-pocket

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[56] *See* CenturyTel Comments at 13. *See also* NTCA Comments at 3.

[57] *See* PUCT Order at 7 ("[F]or purposes of determining whether a paging call is an ELCS [*i.e.,* local] or toll call under the specific facts of this case, CenturyTel's customers are calling ASAP's paging service at ASAP's mobile telephone switching office located in Austin. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS.").

[58] *See* 47 C.F.R. § 51.701(c). *See also id.* at § 51.709(b)(costs of two-way trunks are shared proportionately)

[59] *See* PUCT Comments at 1; CenturyTel Comments at 5.

[60] CenturyTel is wrong when it asserts that it can charge the terminating carrier for the cost of transporting its own customers' traffic to another carrier with a POI in the originating LATA. *See* CenturyTel Comments at 22. In fact, the FCC has squarely rejected this very argument. *See, e.g., TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11168 ¶ 3 (2000), *aff'd, Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001). *See also Southwestern Bell* v. *Texas Public Utilities Comm'n,* 348 F.3d 482 (5th Cir. 2003)(PUCT con-

costs in sending its customers' traffic to ASAP's switch in Austin,[61] it is difficult to understand how CenturyTel would benefit if ASAP established a direct connection to CenturyTel's network in San Marcos, which would force CenturyTel to pay for these facilities.

2. CenturyTel's Wide Area Calling Service. CenturyTel further asserts that toll calls could be avoided if ASAP purchased CenturyTel's Wide Area Calling ("WAC").[62] WAC, "also known as 'reverse billing' or 'reverse toll,'"[63] is a service that LECs formerly offered (before the introduction of wireless number portability).[64] Specifically, with WAC, "a LEC agrees with an interconnector not to assess toll charges on calls from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs."[65] In other words, the terminating carrier "'buys down' the cost of such toll calls to make it appear to [LEC] end users that they have made a local call rather than a toll call."[66]

There are several problems with this WAC alternative. First, ASAP's customers must be willing to change their current telephone number to one that has been dedicated to WAC service,

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cedes that ILECs cannot charge for transport to a POI located in the LATA); *Mountain Communications* v. *FCC,* 355 F.3d 644 (D.C. Cir. 2004); *MCImetro* v. *BellSouth,* 352 F.3d 872 (4th Cir. 2003).

[61] At all times relevant, CenturyTel was not charged for the trunk connecting its San Marcos switch and the SBC tandem switch in Austin. *See* PUCT Order at 15 ¶ 50. The land-to-mobile calls at issue are currently routed from the RLEC's end office switch to the LATA tandem. Thus, there is no factual basis to NTCA's unsupported assertion that existing FCC rules "force LECs to make significant new investments in transport facilities." NTCA Comments at 3.

[62] *See* CenturyTel Comments at 13.

[63] *See TSR Wireless,* 15 FCC Rcd at 11168 n.6.

[64] In providing WAC services, LECs had obtained separate NXX codes that they dedicated to the service so they could distinguish WAC calls from ordinary land-to-mobile calls. WAC service is no longer feasible with wireless LNP because a WAC customer with one wireless carrier may port his/her number to a carrier that does not subscribe to WAC service.

[65] *See TSR Wireless,* 15 FCC Rcd at 11168 n.6.

[66] *Id.* at 11184 ¶ 31.

and thus face the substantial inconvenience of notifying friends, family, and colleagues of the new telephone number. Second, ASAP customers may not want to pay higher service prices that include the per-minute toll charges that the originating customer would ordinarily pay. But the most fundamental defect with CenturyTel's WAC proposal is that it does not cover the calls at issue – namely, local calls between CenturyTel customers and ASAP customers, because with WAC, a wireless carrier (and eventually the wireless customer) pays the *toll charges* that the LEC's customer would ordinarily pay. In the end, CenturyTel's WAC proposal is nothing more than a gimmick for CenturyTel to receive toll revenues for calls that should be rated as local. WAC service can hardly be considered an alternative.

3. Toll-Free Services. CenturyTel finally states that ASAP could obtain toll-free numbers.[67] This "option" has the same three flaws that CenturyTel's WAC proposal: wireless customers would have to change their telephone number; they would pay higher prices to recoup the added toll charges; and they would have to pay toll charges for calls that should be rated as local. In addition, this alternative would require LEC customers to dial eleven digits to reach an ASAP customer ("1" plus the 10-digit toll-free number), as opposed to the seven digits required for an ordinary local call.

VI. THE RURAL LEC VIEW OF INTERCONNECTION LAW IS FLATLY INCONSISTENT WITH CURRENT FCC RULES AND COURT DECISIONS

Rural LEC ("RLEC") trade associations assert that RLECs have "rights to be compensated" for transporting their customers' traffic to the networks serving called parties – a proposition no one challenges.[68] However, these associations then assert that RLECs "should be permit-

[67] *See* CenturyTel Comments at 13.

[68] National Telecommunications Cooperative Association ("NTCA") Comments at 4. *See also* National Exchange Carrier Association ("NECA") and Organization for the Promotion and Advancement of Small

ted" to recover these transport costs from the terminating carrier, rather than from their own customers.[69]

What LECs "should be permitted" to do in the future has no relevance to this proceeding, which involves the state of the law as it exists today. Under existing law – FCC rules (affirmed on appeal), FCC orders applying those rules (affirmed on appeal) and federal court arbitration review orders – the originating carrier is responsible for the costs associated with its own transport of its own customer's traffic (that is subject to reciprocal compensation) to the point of interconnection in the LATA.[70] Indeed, as one of these RLEC associations told the Commission just last month, "the carrier that originates the call will pay the transiting function."[71]

The problem Sprint and other wireless carriers face is that many RLECs refuse to acknowledge the Commission's existing interconnection rules affirmed on appeal.[72] As Sprint noted in its comments, RLECs "will continue to avoid their interconnection responsibilities until this Commission begins to enforce the terms of the Act and its rules."[73]

VII. CONCLUSION

For the foregoing reasons and those set forth in its comments, Sprint respectfully requests that the Commission preempt the PUCT order. Because the legal issues are straightforward and

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Telecommunications Companies ("OPASTCO") Comments at 3 ("[C]arriers such as CenturyTel incur costs for transporting traffic and are entitled to receive compensation for providing such services.").

[69] *See* NTCA Comments at 4; NECA/OPASTCO Comments at 3.

[70] *See* Sprint Comments at 3-5; 7 n.23, and 13-14.

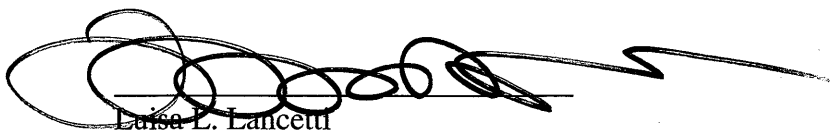
[71] NTCA Ex Parte, CC Docket No. 01-92 (March 10, 2004), *attaching* NTCA, *Bill and Keep: Is It Right for Rural America,* at 40 (March 2004).

[72] As a Pennsylvania arbitrator noted just last month, "ALLTEL once again refuses to recognize or accept FCC decisions and regulations that clearly control." *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act to Establish an Interconnection Agreement with ALLTEL Pennsylvania,* A-310489F7004, *Recommended Decision,* at 18 (March 22, 2004).

because the PUCT order inhibits entry and the ability of wireless carriers to compete with incumbent carriers, Sprint further requests that the Commission act expeditiously on the preemption petition.

Respectfully submitted,

SPRINT CORPORATION



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[73] Sprint Comments at 1.